

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

IN THE MATTER OF)
)
 GENEVA WOODS PHARMACY) OAH No. 12-0953-MDA
)
 _____)

DECISION GRANTING SUMMARY ADJUDICATION

I. Introduction

The Department of Health and Social Services, Division of Health Care Services (Division) hired the auditing firm Meyers and Stauffer to conduct an audit of Medicaid payments made to Geneva Woods Pharmacy (Geneva Woods).

The audit made findings of billing errors in 2008 that resulted in overpayments to Geneva Woods which the Division sought to recover. Geneva Woods appealed the audit's conclusions.

The disputed overpayment findings in this appeal relate primarily to Geneva Woods's weekly-filling bills for longer than 7-day prescriptions for medisets. The Division sought to recover \$563,000 in overpayments for 2008 billings. However, the dispute in this appeal is limited to only \$553,030.77 of those alleged overpayments.

After two extended referrals to alternative dispute resolution, the parties both filed motions for summary adjudication and responded to the other party's briefing. Briefing closed on June 10, 2015. Based on undisputed facts and the arguments of counsel, summary adjudication for Geneva Woods is granted. The disputed audit findings are inconsistent with the regulations and Division policies in effect at the time the billings were made. Under those regulations and policies, dispensing fees for drug prescriptions that were to be dispensed in medisets could be billed weekly when the prescriptions exceeded one week in duration.

II. Undisputed Facts

The issue in dispute in this case is whether Geneva Woods received Medicaid overpayments for billing in 2008 when it dispensed medisets weekly instead of at one time for the number of days prescribed. There is no dispute that Geneva Woods received \$553,030.77 in Medicaid payments for dispensing drugs in 2008 more than once in the form of weekly medisets when the prescriptions were for more than seven days of medication, and the prescriber did not explicitly instruct the medisets to be dispensed weekly. There is no dispute that these weekly dispensing services were provided. There is no dispute that Geneva Woods was entitled to receive reimbursement for dispensing these drugs. There is no dispute that Geneva Woods was entitled to receive reimbursement for dispensing these drugs in medisets. The dispute in this

case is whether Geneva Woods was entitled to reimbursement for dispensing these medisets weekly, or just once for the number of days covered by the prescription.

The disputed billings were for prescriptions filled by Geneva Woods’s medset pharmacy. Geneva Woods calls its weekly dose medisets “medsets.” Geneva Woods’s “medsets” are weekly cassettes or blister-packs that put the correct dosage for one or more drugs in blister that is designated with the correct time and day of the week for the patient to take the drug. Geneva Woods delivers these medsets directly to where the patient is living once per week.

III. Discussion

Summary Adjudication of this Appeal is Appropriate

The Division is required to conduct audits of selected Medicaid providers.¹ It is further required to recoup any overpayments identified in those audits.² The dispute in this case is whether, as a matter of law, all reimbursements received by Geneva Woods for a particular category of services were not reimbursable, and were therefore overpayments.

Both parties moved for summary adjudication. Summary adjudication in an administrative proceeding is similar to summary judgment in a civil proceeding, and the same underlying legal principles apply. Summary adjudication may be granted where there are no material facts in dispute and one party is entitled to judgment as a matter of law.³ The moving party has the burden of showing there is no genuine issue of material fact.⁴ In opposing summary adjudication, the non-moving party need not show that it will ultimately prevail, only that there are material facts to be litigated.⁵ All reasonable inferences of fact are drawn in favor of the party opposing summary adjudication.⁶ If the moving party has supported its motion with affidavits or other admissible evidence, the opposing party must show “by affidavit or other evidence” that a genuine factual dispute does exist.

There are no issues of material fact in dispute in this case. Although both parties raise potential issues of fact in their briefing, none of these potential factual issues need to be resolved in order to issue a ruling in this case. The disputed issue of law is whether the Medicaid regulations in effect in 2008 prohibited reimbursement for weekly dispenses of mediset

¹ AS 47.05.200(a).

² AS 47.05.200(b).

³ *Smith v. State*, 790 P.2d 1352, 1353 (Alaska 1990); 2 AAC 64.250(a).

⁴ *Alaska Rent-A-Car, Inc. v. Ford Motor Company*, 526 P.2d 1136, 1138 (Alaska 1974).

⁵ *Alaska Rent-A-Car*, 526 P.2d at 1139.

⁶ *Alaska Rent-A-Car*, 526 P.2d at 1139.

prescriptions by Geneva Woods when the length of the prescription was for more than a week. Those regulations did not.

Contested Issues of Fact are not Material

A “mediset” prescription is for a series of containers designed for a specific patient containing oral dosages that are labeled with the time and day when each dose is to be taken. Medisets are typically provided to the customer for a consistent weekly schedule of doses, from Sunday to Saturday. The purpose of mediset packaging is to help patients who might otherwise have difficulty adhering to their medication regime and suffer adverse effects as a result. Under 7AAC 145.410(h), certain requirements must be met for a patient to qualify for mediset packaging, such as a having a disability or serious mental illness.

Geneva Woods asserts, and has provided letters from prescribers to support its assertion, that the prescribers who prescribed medisets intended the medisets to be distributed weekly, and assumed that they would be when they prescribed medisets for periods that exceeded seven days.⁷

Geneva Woods asserts in its motion that the Division, over a period of years, understood, accepted and affirmed that the mediset program was a weekly program. If this case needed to be decided on the basis of equitable estoppel, there would also need to be an evidentiary hearing, because determining whether the elements of equitable estoppel were met would require determinations of disputed fact. However, an evidentiary hearing is not required because the regulations in effect, and the Division’s contemporaneous policy declarations interpreting those regulations, provide adequate support for Geneva Woods’s position that the disputed charges were not overpayments. When interpreted in the context of the prescriptions that led to the disputed billings, the language of those regulations show that agency interpretations of those regulations, made in response to legislative attempts to reduce weekly mediset filling charges, correctly interpreted those regulations to allow reimbursement.

The Division’s argument is that, whether all or some of the more than 7-day mediset prescriptions in dispute were actually intended by the prescriber to be filled weekly rather than once during the length of the prescription, and whether there was otherwise medical justification for the weekly frequency of these disputed fills, does not present disputed issues of fact because the regulations clearly limit reimbursement to only one fill for the number of days covered by the prescription.

⁷ See Geneva Woods’s Exhibit 13.

This argument applies the wrong test for upholding a finding of overpayment for over-dispensing a mediset prescription. A prior Medicaid audit appeal upheld a finding of overpayments for medisets, but only upheld the finding of overpayments based on factual findings that either showed that the prescriptions were not for medisets, or where the evidence, including specific language on the prescription, including the specific printed prescription instructions “FILL ALL OR NONE – NO PARTIAL FILLS,” showed that prescription was for the mediset to be dispensed less often than once per week.⁸ In this case, there is no dispute that the prescriptions were for medisets, and the language of the prescriptions does not include explicit prohibitions on weekly fills. Based on the undisputed facts in this case, weekly mediset fills were consistent with the prescriptions.

The Division asserts that Geneva Woods adopted a policy of filling all mediset prescriptions on a weekly basis to maximize its profits to the detriment of the Medicaid program.⁹ While an increase in profits as a motivation could be inferred from the undisputed fact that more frequent fillings results in more billings, protecting the health and safety of clients, or filling the prescription in a manner that is consistent with the implicit direction of the prescriber could also be inferred as motivations. If the factual issue of the motivation of Geneva Woods needed to be decided, an evidentiary hearing would be required.¹⁰ However, an evidentiary hearing is not required because a profit motive for dispensing in accordance with the regulations does not make charges for those filled overpayments.

The regulation allowing the Division to sanction providers who fill a prescription with a lesser quantity than prescribed is inapplicable in this case because that regulation only applies when the reason for a fill with less than prescribed is “in order to receive multiple dispensing fees.”¹¹ The mere inference of a profit motive is not enough to invoke the sanction. There must be a showing that there was no medically justifiable basis for the decision for more frequent fills; a showing that cannot be made here. Furthermore, Geneva Woods did not fill a prescription with a lesser quantity than prescribed if, taken in the context in which they were prescribed, Geneva

⁸ *In the matter of Anchorage Medset Pharmacy*, OAH No. 10-0641-DHS at pages 4-7.

⁹ Division’s Motion at page 11.

¹⁰ *See Crum v. Stalnacker*, 936 P.2d 1254 (Alaska 1997).

¹¹ Former 7AAC 43.950(22) provided:

Sanctions may be imposed by the division for any one or more of the following reasons:

(22) dispensing a lesser quantity of a drug than that prescribed in order to receive multiple dispensing fees for one prescription, unless the drug provider is reducing the prescribed amount in order to dispense no more than a 30-day supply.

Woods correctly dispensed medisets weekly in cases where the prescription was for a longer period, based on the reasonable interpretation of those prescriptions: that interpretation being that the prescription should be filled weekly as medisets.

Because these factual issues raised by the parties do not need to be resolved to determine whether Geneva Woods's policy of filling mediset prescriptions weekly was consistent with billing regulations, the dispute in this case is, therefore, a question of law which can be decided in summary adjudication in Geneva Woods's favor.

Regulations & Contemporaneous Agency Interpretations Allow Reimbursement

In this case, the regulations in effect during the audit period and the agency policies and public declarations interpreting those regulations do not restrict billings for medisets provided on a weekly basis, when the prescription was for a longer period than one week and did not specifically state that the medisets were to be dispensed to the patient on a weekly basis. The regulations in effect during the audit period merely limited charges for dispensing fees for medisets to no more than one charge every seven days.¹² Agency policies and public declarations prior to, during, and after the audit period show that these regulations were interpreted to allow reimbursement for weekly mediset fills when the prescription covered a period of more than one week.

Agency Policies and Public Declarations on Frequency of Mediset Fills

In 2000, an Alaska Department of Health and Social Services policy letter issued in response to a legislative audit set the limit for reimbursement for a mediset prescription fill to no more than one filling charge every 7 days.¹³ A 2003 legislative audit concluded that this policy letter permitted pharmacies to bill dispensing fees for 7-day mediset fills when the prescription was for 30 days. This audit conclusion was critical of this policy letter, indicating that reimbursement for weekly dispensing fees was inconsistent with the regulations in effect at the time, indicating that only one filling charge should be reimbursed for a 30-day prescription.¹⁴ The Deputy Commissioner of the Alaska Department of Health and Social Services defended the 2000 policy letter in response to this audit criticism, arguing that the policy of allowing filling charges for a lesser quantity than prescribed is consistent with the regulatory requirements if the

¹² Former 7AAC 43.591(p) & (q). Former 7AAC 43.591 was amended, effective April 14, 2007, to add (p) & (q).

¹³ Geneva Woods's Motion at page 2.

¹⁴ Geneva Woods's Motion at page 2.

pharmacist has a legitimate reason of practice unrelated to receiving more dispensing fees.¹⁵ Geneva Woods provided additional documentation of 2004 legislative audit criticism of the policy and cost impact of allowing reimbursement for weekly filling charges for medisets, and the Department of Health and Social Services's defense of the policy allowing reimbursement for those charges.¹⁶

In 2005, perhaps in response to this pressure from legislative audit findings, the Department of Health and Social Services initiated a move to restrict reimbursement for fill charges for weekly medisets to two per month, but this plan was abandoned.¹⁷

Finally, in 2007 the amended regulation on mediset billing that was in effect during the audit period, 7AAC 43.591(p) & (q), went into effect. This regulation codified the no more than one dispensing fee per seven-day supply restriction.

In 2011, a regulation went into effect for mediset fill reimbursement to one dispensing fee every month plus a five dollar mediset fee no more than once every seven days.

In 2014, regulation 7AAC 145.410 went into effect, again changing the limitations on reimbursement for mediset by setting a dispensing fee reimbursement restriction at \$16.58 every 14 days. However, the Department of Health and Social Services indicated that this change did not mandate a change in how medisets were dispensed, only how pharmacies would be reimbursed.¹⁸

This history, and the language of the regulations, show that the regulations in effect during the audit period simply do not allow the Division to decline to reimburse Geneva Woods for the prescribed medisets that were provided weekly based on the fact that these prescriptions were for more than 7-day doses of the drugs.

The Division argues that the legislative audit positions critical to the Department's policy of allowing reimbursements for weekly fills of medisets when the prescription is for longer than a week should be controlling.¹⁹ This would effectively retroactively apply an interpretation of the regulations that the Department publicly rejected prior to the audit period and did not even fully adopt when the regulations were amended several years later.

¹⁵ Geneva Woods's Exhibit 3, page 14.

¹⁶ Geneva Woods's Exhibit 4.

¹⁷ Geneva Woods's Exhibit 5.

¹⁸ Geneva Woods's Exhibit 6.

¹⁹ Division's Opposition to Geneva Woods Pharmacy's Motion for Summary Adjudication at page 8.

Medicaid Regulations Allow Reimbursement

More importantly, the Department's interpretation of the regulations in effect when Geneva Woods was providing the services where reimbursement is in dispute was correct. The Division cites the language of former 12 AAC 52.410 for its position that the disputed weekly mediset fills were inconsistent with a mediset prescription for more than seven days. This regulation merely sets out the expected information that a pharmacist should obtain in order to fill a prescription correctly. None of the prescribers is alleging that Geneva Woods filled the prescriptions incorrectly by dispensing weekly. When prescribing, for example, a 28-day mediset prescription through a mediset pharmacy, which always fills and dispenses medisets weekly, the meaning of the 28-day mediset prescription is not even ambiguous. As the legislative audit indicates, that prescription is going to result in four reimbursable weekly mediset fills.

The Division argues that Geneva Woods had no medically justifiable basis to dispense four weekly mediset fills for a 28-day mediset prescription, but the medical justification for mediset seven day fills is obvious. If a client needs to have doses delivered in a mediset to prevent them from becoming confused and being put to an unreasonable risk of injury as a result of not remembering to take their medications at the right time, or remembering whether they have already taken their medication, giving those vulnerable patients several weeks' worth of medisets to confuse puts these patients at substantially more risk than giving those patients one weekly mediset at a time. Having only to keep track of what day of the week it is, and what time it is, allows these patients to administer their own medication safely. Giving these patients several medisets to keep track of at one time may not. The Division's argument that Geneva Woods should have dispensed four 7-day medisets at once when filling a 28-day mediset prescription is frankly a counterintuitive and medically dangerous interpretation of that prescription.

Mitigation Factors Would Require a Hearing

If there was an overpayment in this case, a hearing would be required to make findings on the considerations that the Commissioner is required to take into account in an overpayment appeal. These considerations include the provider's error rate; history of similar audits; prior noncompliance and training; submission of false, fraudulent or

incomplete information, and any health or safety risk to recipients.²⁰ Geneva Woods apparently does not have a problematic reporting history. The alleged error, if anything, lowered the health or safety risk to recipients by providing them with weekly medisets rather than longer-term medisets, or more than one weekly mediset at a time, which decreased the risk of harm from accidental dosage mistakes. There was no indication of significant error rates, or prior noncompliance presented. There was no indication of false, fraudulent, or incomplete information. This case therefore would require an evidentiary hearing on these mitigating issues if summary adjudication in Geneva Woods's favor was not being granted.

IV. Conclusion

The disputed audit findings are inconsistent with the regulations and Division policies in effect at the time these billings were made. Under those regulations and policies, dispensing fees for drugs that were to be dispensed in medisets could be billed weekly for prescriptions that exceeded one week in duration. The Division's Motion for Summary Adjudication is denied. Geneva Woods's Motion for Summary Adjudication for is granted.

The Division's determination that it is entitled to repayment in the amount of \$553,030.77 is OVERTURNED.

DATED this 14th day of October, 2015.

By: Signed
Mark T. Handley
Administrative Law Judge

²⁰ 7 AAC 160.130(c)(1)-(5). The Division incorrectly maintains that these considerations are not part of this appeal. The Commissioner is the final decision maker in this appeal. There is no statutory direction that the issues of overpayment and mitigation for any overpayment should be bifurcated into separate appeals. *See In re: C Care Services*, OAH No. 11-0015-DHS, at p. 9 (Commissioner, Dept. of Health & Soc. Services, May 15, 2012) (overpayment hearings are designed to reach a commissioner-level decision on whether recoupment is due and in what amount); *In re: Yoo Woon*, OAH No. 12-0264-MDA, Decision on Summary Adjudication, at p. 5-6 (Commissioner, Health & Soc. Services, October 8, 2014) (considering 7 AAC 160.130(c) factors).

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 23rd day November, 2015.

By: Signed
Signature
Jared C. Kosin, J.D., M.B.A.
Name
Executive Director, ORR, DHSS
Title

[This document has been modified to conform to the technical standards for publication.]